No. 3059

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA
Plaintiff in Error,

vs.

ASH SHEEP COMPANY, a Corporation,
Defendant in Error.

Brief of Defendant in Error

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STATE PUBLISHING CO., HELENA, MONT.

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BRIEF OF DEFENDANT IN ERROR.

A more extended statement of the proceedings which took place before the institution of the instant action may not be amiss. In 1913, the United States brought suit against the Ash Sheep Company to enjoin it from pasturing its sheep on this land, claiming that the Indian title to same had not been extinguished and claiming damages in the sum of $7100.00. The trial court held that the lands were a portion of the public domain, and dismissed the proceedings. The case came to this court on appeal, and the judgment of the lower court was reversed, with directions to issue a permanent injunction and with directions to ascertain the damages done on account of the trespasses

committed. A decree in that action was rendered and entered, permanently enjoining the company from grazing its sheep on this land and awarding it one dollar damages. (Answer, Tr. pp. 9-31.) No appeal was taken by the United States from this decree. An appeal, however, was taken from the decree by the Ash Sheep Company. The present action was instituted by the United States to recover the penalty provided for by Section 2117 of the Revised Statutes of the United States, which reads as follows:

> "Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock."

It is alleged in the complaint that the lands in question were within the original boundaries of the Crow Reservation; that they were vacant lands on which no settlements had been made, and that the Indian title to them had not been extinguished; that 7,100 head of sheep were ranged over and grazed on the lands, and that under the provisions of the law above referred to, the United States was entitled to recover the sum of $7,100.00 for the use and benefit of the Indians. (Complaint, Tr. p. 2.)

The answer denied that the Indian title had not been extinguished; denied the item of damages, and denied the grazing of the sheep, except to the extent set forth. The answer then alleged that the

Ash Sheep Company owned several tracts of this ceded land; that it leased several tracts from the owners amounting, in the aggregate, to several thousand acres, as to which the title had passed from the Government, and that this land was in separate tracts or bodies, and that in getting three or four thousand head of its sheep to these lands, they were necessarily driven across the land involved, and thus being driven they grazed on the land, and it was likewise alleged that the lands owned and leased by the company were so situate that they could not be used by it for pasturage purposes without the sheep being driven across the land involved.

The answer likewise set up the former litigation, as above set forth, and urged that by reason of such litigation, the United States was estopped from maintaining the present action, and that its right to recover the penalty was determined adversely to it in the former litigation. (Answer, Tr. pp. 9-14.)

A motion for judgment on the pleadings was presented by the defendant company and sustained. (Tr. p. 37.) And a judgment in its favor was rendered and entered. (Tr. p. 40.)

ARGUMENT.

The trial court in sustaining the motion held that the law referred to did not apply to sheep. (Tr. p. 38.)

United States v. Ash Sheep Co., 229 Fed. 479.

The character of the land, so far as this court is concerned except as the matter may be again taken up, is disposed of by United States v. Ash Sheep Co., 221 Fed. 582. As already stated, when the final judgment was entered in that case, the Ash Sheep Company appealed from the decree in that case. The United States did not appeal. The question of the character of the land is again presented for review in the appeal of the Ash Sheep Company, and that is the only question that is presented and the brief in that case, reviewing the question at length, renders it unnecessary in this brief to discuss that particular subject, except to refer to and rely on the brief in that appeal.

We will take up in this brief, then, the other questions, which, from our standpoint, are involved, not intending, however, to waive in this case the consideration of the question that the said lands were public lands to which the Indian title was extinguished.

(See Appellant's brief Case No. 2885, now pending in this court.)

Ash Sheep Co. v. United States of America, 221 Fed. 583.

Taking up the law under which this penalty is sought, it will be conceded that the statute in question is a penal one, and in construing such a statute, the rule of strict construction applies. Under such rule, nothing should be included that fairly does not come within the express provisions of the law. The Supreme Court of the

United States has declared in various cases the rule of construction that should apply in the case of penal statutes. We instance the following:

> "No one can be punished for the violation of a statute unless his case is plainly and unmistakably within its terms."
>
> United States v. Lacher, 134 U. S. 624, 33 L. Ed. 1080.

The object of a penal statute is to modify the purpose of the legislative intent, not to furnish scientific definitions, and that intent is usually to be found in giving to the words the meaning used in ordinary speech.

Sarlls v. U. S., 152 U. S. 570, 38 L. Ed. 556.

Penal laws are to be construed strictly. The intention of a penal statute must be found in the language actually used interpreted according to its fair and obvious meaning.

U. S. v. Harris, 177 U. S. 305, 44 L. Ed. 780.

To the same effect is the doctrine declared in the following cases:

U. S. v. Gooding, 12 Wheat. 460, 6 L. Ed. 693;
Greeley v. Thompson, 10 How. 225, 13 L. Ed. 397;
Baldwin v. Franks, 120 U. S. 678, 30 L. Ed. 766;
Tiffany v. Nat'l. Bank of Mo., 18 Wall. 409, 21 L. Ed. 862.

We quote the following from the case of United States v. Harris, 177 U. S. 305, 44 L. Ed. 780:

> "It must be admitted that, in order to hold the receivers, they must be regarded as included in the word 'company.' Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel of the government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subject to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

This court having in mind this rule, used the following language in the case of

Bircher v. U. S., 169 Fed. 591;

> "We do not overlook the general rule that the intention of the legislature is to be gathered from the words which they employ, and that while a case may fall within the mischief to be remedied, and in the same class therewith, still, if it be not within the words of the statute, construction will not be permitted to bring it therein."

Surely, no one would contend for a moment, speaking of cattle in ordinary conversation, by

any stretch of the imagination it could be said he had in mind sheep. If the enlarged meaning is given to the term, then it might be pertinently asked, why mention horses and mules? The mentioning of these animals specifically, clearly indicates a purpose that the enlarged meaning should not be given to the term "cattle," as contended for by the government. The term "cattle" as generally understood is used in reference to animals of the bovine species. This is true where, in excise laws, custom duties are imposed on hides.

Rossbach v. U. S., 116 Fed. 781;
U. S. v. Schmoll, 154 Fed. 734.

(See also decision of trial court in case U. S. v. Ash Sheep Co., 229 Fed. 479.)

Keys v. U. S., 103 Pac. 874.

As a further aid to construing this law, reference may be made to its genesis and history.

The Supreme Court of the United States in the case of

U. S. v. Hirsch, 100 U. S. 33, 25 L. Ed. 539,

said that in construing any part of the United States Revised Statutes, it is admissible, and often necessary, to recur to its connection in the act of which it was originally a part.

See likewise:

U. S. v. Bowen, 100 U. S. 508, 25 L. Ed. 631,
The Conqueror, 166 U. S. 110, 41 L. Ed. 937;
U. S. v. Lacher, *supra.*

Tracing the history of this law, we find it first

in the statutes of 1799. Then in force, it read as follows:

> "*And be it further enacted,* That if any citizen of, or other person resident in the United States, or either of the territorial districts of the United States, * * shall drive, or otherwise convey any stock of horses or cattle to range, on any lands allotted or secured by treaty with the United States, to any Indian tribes, he shall forfeit a sum not exceeding one hundred dollars, or be imprisoned not exceeding six months."
>
> (Sec. 2 of Act of 1799, First Stat. at Large, page 744.)

The subject was next considered by Congress in the year 1834 when the law as it now stands was enacted. (4 Stat. at Large, page 730.) In the first act, it will be noticed that horses and cattle were mentioned, in the later act mules were added. If, in this legislation, Congress intended to give to the term "cattle" the extended meaning which the Government insists should be given to it, there was no need for expressly mentioning mules. Indeed, so far as that is concerned, if the contention of the government is upheld, the mentioning of horses and mules was unnecessary. We insist that there is in the history of this legislation the purpose of the law-making body to give to the terms used a generic limitation.

Former Adjudication and Estoppel.

In the equitable action that was instituted, the government sought to recover this penalty. It is

true that no express mention is made of the fact that the damage demanded was by virtue of the law in question. It is true, nevertheless, that the right to recover the damage under this law was asserted. In the equitable action the Government insisted that, regardless of the damage that was done, the statute fixed the amount of it, and it was entitled to recover one dollar per head. The trial court decided against it, and that decision stands unappealed from and has in it the element of finality. We submit that the decision in that case, adverse to the United States, as to its right to recover this money, is determinative of its right to do so in the present action.

In the case of

> Forsyth v. Hammond, 166 U. S. 506, 41 L. Ed. 1095,

the Supreme Court of the United States declared that a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions, though the form and causes of action be different.

In the case of

> Southern P. R. Co. v. U. S., 168 U. S. 1, 42 L. Ed. 355,

it was declared that a right to question a fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties and their privies, even

if that suit is for a different cause of action. And in the case of

Wabash Gas Light Co. v. District of Columbia, 161 U. S. 316, 40 L. Ed. 712,

it was said that for the purpose of ascertaining the subject matter of a controversy and fixing the scope of the thing adjudged, the entire record, including the testimony offered in the suit, may be examined.

In the equitable action, the United States insisted on its right to recover this penalty, as we have already stated. The trial court held against its claim as will be noticed by the decision.

U. S. v. Ash Sheep Co., 229 Fed. 479.

The judgment in that case stands unreversed and is unappealed from and we insist that it stands as a bar against the maintenance and prosecution of the present action.

We submit, likewise, that the United States in demanding damages, as it did in the equitable action, should now be estopped (having recovered damages in that action for the injury done) from maintaining the present action to recover additional damages. This principle we are now contending for finds expression in the case of

Kendall v. Stokes, 3 How. 87, 11 L. Ed. 506,

where it is said that where a party having a choice of remedies for a wrong done, selects one, proceeds to judgment and reaps the fruit of his judg-

ment, he cannot afterwards proceed in another suit for the same cause of action.

And Judge Sanborn, speaking for the Circuit Court of Appeals for the Eighth Circuit in the case of

Union Central Life Ins. Co. v. Drake, 214 Fed. 536,

said:

> "When the second suit is upon a different cause of action but between the same parties as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action."

In this case, in the equitable action, under the proof adduced for the purpose of showing damages, the government was unable to show that any damage was done; but the trespass being admitted, nominal damages were awarded. In that action, the government insisted, regardless of the actual damage, that it was entitled to recover one dollar per head by virtue of the provisions of the statute under consideration. The trial court, rightfully or wrongfully, decided against this contention. Surely, the government is not at liberty, having permitted the judgment in that case to become final, to relitigate this question. If it felt dissatisfied with the incorrectness of that judgment, it should be appealed from. Not having done so, that judgment is final, and the determination of the right to recover this penalty having been passed upon in that action, it cannot now in the

present action again assert that right. The judgment under review should be affirmed.

Respectfully submitted,

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